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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

DANNY RYAN SASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PROSECUTION PSYCHIATRIST'S TESTIMONY VIOLATED FEDERAL RULE OF EVIDENCE 704(b) BECAUSE HE REPEATEDLY EXPRESSED AN OPINION AS TO MR. SASS'S SANITY AT THE TIME OF THE COMMISSION OF THE OFFENSE?

PARTIES TO THE PROCEEDING

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OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals affirming the conviction of Danny Ryan Sass is *United States v. Danny Ryan Sass*, No. 96-50165, an unpublished memorandum

decision. The district court case is *United States v. Danny Ryan Sass*, CR-93-00068-RMB.

STATEMENT OF JURISDICTION

On April 8, 1997, the Ninth Circuit Court of Appeals entered judgment affirming Mr. Sass's conviction, in this case. This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the relevant constitutional provisions, statutes and regulations involved are cited here and the pertinent text is set out in the appendix.

28 U.S.C. Federal Rules of Evidence Rule 704(b)

18 U.S.C. §17

STATEMENT OF THE CASE

Petitioner respectfully requests that a writ of certiorari be issued to review the judgment of the Ninth

Circuit Court of Appeals, in *United States v. Danny Ryan Sass*, No. 96-50165, which affirmed the district court's conviction of Mr. Sass. The Ninth Circuit Court of Appeals had jurisdiction to review this case pursuant to Title 18 U.S.C. §1294(1).

Danny Sass was, at the time of his arrest, a 47 year old Vietnam veteran, who was working as a plumber.

On December 15, 1992, Danny Sass was introduced by his friend Mark Little, to a Drug Enforcement Administration (DEA) agent, Agent McConnell, who was acting undercover as a drug buyer. In order to encourage Mr. Sass to engage in a drug transaction with the agent, Mark Little told Mr. Sass that Mr. Little was probably going to go to jail and that he needed this money for his family. Mr. Little admitted using his friendship with Mr. Sass to get him involved in the drug deal. Mr. Sass and the agent agreed to conduct a deal for twenty pounds of methamphetamine sometime after the first of the following year, with a five pound deal earlier.

On January 8, 1993, the agent and the defendant met again. At this meeting, Mr. Sass provided the agent with a very small sample of methamphetamine and told him that he had a new female source of supply for methamphetamine, (identified later as Jeanne Courtwright). Later that day, Mr. Sass told the agent that he could get him two pounds immediately, but the agent said he needed at least five pounds.

On January 11, 1993, Danny Sass rented a hotel room to conduct the deal. There were discussions on the phone, between the defendant and the agent about getting together money and arranging a time for the deal. Finally, Ms. Courtwright apologized to the agent on the phone for only having two pounds of drug and asked him to do the deal on January 12, 1993. Danny Sass and the agent talked and agreed to meet the following day in the Best Western Hotel parking lot in Escondido.

On January 12, 1993, the agent and Danny Sass met at the prearranged meeting place. Danny Sass showed the

agent about one pound of methamphetamine and told the agent that the rest was in the hotel room because it did not fit under his jacket. The agent insisted on seeing all five pounds and gave Mr. Sass a gym bag in which to put the rest of the drug. Danny Sass was arrested after giving the drug to the agent.

Dr. Isaac N. Silberman, a neurologist, administered an electroencephalogram test (EEG) to Danny Sass and issued a report on April 8, 1993 which concluded that Danny Sass had organic dysfunction, meaning he is brain damaged. On April 30, 1993, Danny Sass was diagnosed by Sheila Bastien, Ph.D., a neuropsychologist, with pre-senile dementia which impaired his judgment, impulse control, memory, abstract reasoning, concentration, ability to sequentially plan, and his ability to process, integrate or understand new information. Mr. Sass had sought treatment in 1992 from the V.A. hospital because of these symptoms. In Vietnam, he had suffered multiple concussions from the pounding of artillery. This military

experience was a possible cause of the progressive slow deterioration of Mr. Sass' brain. In short, Danny Sass is more vulnerable to following the wishes of other people than a normal person would be.

As a result of his condition, Mr. Sass lost his ability to concentrate and his memory deteriorated to the point that he would often forget where he was going after driving for only a few minutes. This impairment even affected his work as a plumber because he would often have to redo a job three times before the customer was satisfied. His customers were constantly complaining about his work. There is actual, measurable, physical damage to Mr. Sass's brain and his condition continues to deteriorate.

On January 21, 1993 an indictment was filed in the Southern District of California, charging Mr. Sass with the following: conspiracy to distribute methamphetamine in violation of Title 21, United States Code (hereinafter "U.S.C."), section 846, 841(a)(1). (E.C.R. 1-5) and aiding and abetting possession of methamphetamine with intent

to distribute in violation of 21 U.S.C. § 841(a)(1) and §2.

A competency hearing in this case was held on March 16, 1994 and March 17, 1994. The defendant was ruled competent to stand trial on March 17, 1994, by the Honorable Judith N. Keep. Motions in the case were heard and ruled upon by the Honorable Rudi M. Brewster on March 17, 1994 and, from March 17, 1996 to March 29, 1996, Mr. Sass was tried before a jury on this case. On March 24, 1996, Mr. Sass was not present for his trial and at 1:45 a bench warrant was issued. The defendant never returned to his trial and his bond was forfeited. On March 29, 1996, after three and one half hours of deliberation, the jury convicted Mr. Sass on both counts.

On March 11, 1996, Mr. Sass was sentenced to 20 years (240 months) in a federal correctional institution.[1]

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[1] Judge Brewster was reluctant to impose this sentence but felt constrained to do so by the mandatory minimum provisions of the statute. "The court is going to impose a sentence of 240 months on the grounds that the court

Mr. Sass appealed his conviction on August 15, 1996. The Ninth Circuit Court of Appeals affirmed the conviction on April 8, 1997.

REASONS FOR ALLOWANCE OF THE WRIT

The Court should grant certiorari in this case because it presents a novel and important question of law regarding the interpretation of Rule 704(b) of the Federal Rules of evidence, which has never been decided by this Court.

I. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE ADMISSION OF THE PROSECUTION PSYCHIATRIST'S TESTIMONY VIOLATED FEDERAL RULE OF EVIDENCE 704(b) BECAUSE HE REPEATEDLY EXPRESSED AN OPINION AS TO MR. SASS'S SANITY AT THE TIME OF THE COMMISSION OF THE OFFENSE.

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accepts the representation of both sides that it appears that the 240-month is the floor sentence. I'm going to withhold typing this sentence for two days. .... If there is a basis for piercing the floor based upon the departure that the court finds for diminished capacity, the court would impose a sentence of 151 months." ... " I would pierce it, and also I will say for the record that I would pierce it if I could."

A. THE PROSECUTION PSYCHIATRIST'S TESTIMONY VIOLATED RULE 704(b) BECAUSE HE STATED THAT MR. SASS WAS SANE AT THE TIME OF THE OFFENSE.

Rule 704(b) of the Federal Rule of Evidence states in relevant part as follows:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.(emphasis added)

In a case in which the defendant makes insanity his defense, the ultimate issue on which the expert is forbidden from testifying is whether at the time of the crime the defendant appreciated the nature and quality or wrongfulness of his acts. *United States v. West*, 962 F.2d 1243, 1246 (7th Cir. 1992). Under 704(b), "expert psychiatric testimony is limited to presenting and explaining their diagnosis, such as whether the defendant

had a severe mental disease or defect and what the characteristics of such disease or defect, if any, may have been." *U.S. V. Dennisson*, 937 F.2d 559 (10th Cir. 1991) citing S.Rep. No. 225, 98th Cong., 2nd Sess. 230 (Report on Comprehensive Crime Control Act of 1984), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3412,. In the instant case, the prosecution expert witness went far beyond this limited permissible testimony and violated Rule 704(b) of the Federal Rules of Evidence.

Rule 704(b) of the Federal Rules of Evidence was adopted contemporaneously with 18 U.S.C. § 17, which sets forth the legal standards for the insanity defense in federal court. 18 U.S.C. § 17 makes the ultimate issues of an insanity defense, whether the defendant appreciated the nature and quality or the wrongfulness of his acts. These ultimate issues under Rule 704(b), are for the trier of fact alone. No expert may properly testify about these issues. *See United States v. Kristiansen*, 901 F.2d 1463 (8th Cir. 1990); *United States v. Manley*, 893 F.2d 1221 (11th Cir.

1990); *United States v. Owens*, 854 F.2d 432, 434, N.5 (11th Cir. 1988); *United States v. Alexander*, 805 F.2d 1458, 1463 (11th Cir. 1986). "Determining whether a criminal defendant was legally insane is a matter for legal fact-finders, not for experts." *Id* at 1463.

In this case, the prosecution's examination of Dr. Mark Kalish, the government expert, violated the provisions of Rule 704(b). The testimony elicited was directly in contravention of the rule. The direct examination included the following:

> Q. What do you do when you interview or meet with a criminal defendant in order to arrive at an opinion – a conclusion as to sanity or insanity? (emphasis added)
>
> A. Well, the first thing that I do is I try to review as many records as I can, including past medical records and records that pertain to the time in question. So I'll look at police arrest and investigative reports, sometimes there's audio tapes or video tapes of an interrogation or of the crime itself, and I'll look at those, and then I'll have the person come in and I'll talk to them - - I'll interview them - - conduct a standard psychiatric examination.

Q. All right. When Sass walked into your office for the first time, did you have any preconceived notion as to his sanity or insanity based on everything that you had read before he walked in for the first time? (emphasis added)

A. No.

Q. So he walked in – he walks in, you had an open mind-

A. Yes. ...

Q. And after all the tests, all the interviews that you had with him, listening to the tapes and reading the reports, et cetera, what is your conclusion? Was the Defendant sane or insane at the time of the offense in question, from December 15th, 1992, to January 12th, 1993?

A. He was very sane.

Q. When you say "very sane", meaning -- you mean what?

A. Well, he understood the nature and quality of his act, and he understood that it was wrong.

Q. Did you find anything in the Defendant's make-up –his chemistry – that would prevent him from understanding and appreciating the wrongfulness of his conduct?

A. No.

Q. Anything whatsoever?

A. No. (emphasis added)...

Q. So you – when the defendant came into the – your office and you interviewed him on three separate occasions, his clinical appearance to you indicated what?

A. I thought he was a very nice guy. I mean, he was pleasant, cooperative, given the situation, he obviously was depressed and anxious given the situation he found himself in, but there was no evidence on the clinical examination or the testing that he was unable to understand the nature and quality of his act, or that he was in any way impaired in his ability to know right from wrong. And that's the test. (emphasis added)...

Q. Compelling in the sense that it supports your conclusion that he was sane during that relevant time period?

A. Yes. (emphasis added)

The above questioning by the prosecution was specifically designed to elicit the expert's opinion on the ultimate legal issue because the prosecutor asked about the

defendant's ability to appreciate the wrongfulness of his conduct. This is similar to *U.S. v. Manley*, 893 F.2d 1221 (11th Cir. 1990), in which defense counsel described a hypothetical person with the exact mental disease the defendant claimed to have and then asked the expert if this hypothetical person would be able to appreciate the wrongfulness of their actions. *Manley* at 1222. The *Manley* Court found that this question violated 704 (b) because it directly tracked the language of the statute and was designed to elicit an expert's opinion on the ultimate legal issue in the case. *Id* at 1225. The above questioning by the prosecution was an even more flagrant violation of Rule 704(b), as the prosecutor did not even bother to couch his question as a hypothetical. Rather, he directly tracked the language of the statute and elicited expert testimony on the ultimate issue.

"Sane" and "insane" are legal terms. It is the court's function to define legal terms, not the witness's.

Federal Rule of Evidence 704 permits a

> witness to testify in the form of an opinion or inference to an ultimate issue to be decided by the trier of fact However, it is not for the witness to instruct the jury as to the applicable principles of law, but for the judge. *Shahid v. City of Detroit*, 889 F.2d 1543, 1548 (6th Cir. 1989) *citing, Marx & Co. Inc. v. Diner's Club*, 550 F. 2d 505, 509-10 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977).

"It is the responsibility of the Court, not the testifying witness, to define legal terms." *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994) "Whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in instructing the jury." *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992).

In *Berry*, the prosecution witness testified that "gross negligence" constituted "deliberate indifference." The Appellate Court found that "deliberate indifference" was a legal term and that "the expert's testimony in this regard invaded the province of the court." *Berry* at 1353.

In the instant case, Dr. Kalish was asked the following question by the prosecution: "Was the Defendant sane or insane at the time of the offense in question, from

December 15th, 1992, to January 12th, 1993?"

He responded as follows: "He was very sane." The prosecutor further inquired: "When you say "very sane", meaning – you mean what?" Dr. Kalish responded: "Well, he understood the nature and quality of his act, and he understood that it was wrong." Dr. Kalish was clearly asked by the prosecutor to define the legal terms regarding sanity and Dr. Kalish defined the legal term, "sane" for the jury and he told them that Mr. Sass was "very sane". As in *Berry*, the witness defined a legal term which should only have been defined by the judge. Moreover, the prosecutor's questions were obviously designed to elicit a response from the witness defining the legal term, "sane". Thus, this exchange between the prosecutor and the witness violated Rule 704(b), by usurping the Judge's role as the sole instructor of the jury on the law.

On re-direct examination the prosecution questioning again violated the clear dictates of Rule 704(b) as follows:

> Q. Okay. Well, let's assume that he had this organic brain dysfunction – whatever it may be or how severe it may be. In your opinion, after doing all of your tests, the clinical evaluations, reviewing all the records, the audio tapes, the police reports, etcetera, was the defendant unable to appreciate the wrongfulness of his conduct during the period of time in question – that is, December of '92 to January of '93?
>
> A. He was, in my opinion, quite capable, and I would point you to the audio tapes and to Mr. Sass's own description to me in my session with him on June 23rd what he told me he was thinking. (emphasis added)

The prosecution questioning plainly violated Rule 704(b) in a direct, substantial, and prejudicial way. The testimony which was adduced from the prosecution expert was clearly prejudicial to the defendant on the issue of sanity, which was the only defense raised during the course of the trial. Admission of this extremely prejudicial testimony in direct contravention of the rule was plain error.

B. THE PETITIONER DID NOT OPEN THE DOOR TO ALLOW GOVERNMENT EXPERT TESTIMONY REGARDING HIS MENTAL STATE AT THE TIME OF THE OFFENSE, BUT EVEN IF THIS COURT FINDS THAT THE PETITIONER OPENED THE DOOR TO SUCH TESTIMONY, THE GOVERNMENT SHOULD NOT HAVE BEEN ALLOWED TO TOTALLY DISREGARD RULE 704(b), BY OFFERING REBUTTAL TESTIMONY, WHICH FAR EXCEEDED ANY SLIGHT VIOLATION OF THE RULE BY THE PETITIONER.

The defense expert witness, Cynthia Stout was questioned on direct and testified as follows:

> Q. Okay. Within that context, how, in your opinion, would his medical condition of pre- - I'm sorry, his mental condition of pre-senile dementia – affect his ability to appreciate the nature and consequences or the wrongfulness of his acts?
>
> A. My professional opinion is that Mr. Sass is unable to determine the rightness or wrongness of a course of action, and that that's a byproduct of his organic brain damage and it's made worse by his personality – the personality diagnosis that he would be given of dependent and schizoid.

Q. Those in effect, make the dementia more vulnerable; is that what you're saying?

A. That's correct.

This was the only testimony of a defense witness regarding the petitioner's ability to determine right from wrong. It was the only testimony by a defense witness, which arguably may have been in violation of Rule 704(b). The Ninth Circuit ruled that this question by defense counsel and this answer by the witness opened the door to admission of the government expert's testimony that Mr. Sass was sane at the time of the offense.

However, this question should not have been construed to have "opened the door" to permit the prosecutor to blatantly violate Rule 704(b) because the question asked by defense counsel related to the symptoms and qualities of Mr. Sass's disease. In *United States v. Kristiansen*, 901 F.2d 1463, 1466 (8th Cir. 1990), the Court found that a very similar question to the one asked by defense counsel of Ms. Stout was proper under Rule 704(b).

In *Kristiansen*, the Court of Appeals found that the district court had erred by excluding a question regarding the mental state of the defendant, by defense counsel. Defense counsel wanted to ask her mental health expert, whether the mental condition the defendant allegedly suffered from would affect his ability to appreciate his actions. The Court of Appeals found that the district court should have allowed the defense to ask the expert if the mental condition the defendant suffered from would cause him to fail to appreciate the nature and quality of his actions. *Kristiansen* at 1466. The Court noted the following reason for approving the question under Rule 704(b):

> The fact that part of the wording of a question may track the legal test by asking if the disease prevents one suffering from the disease from understanding the nature and quality of an act does not violate the rule. The jury is left to ultimately decide whether the disease was so strongly present that the defendant himself suffered the effect of being unable to appreciate the quality of his act. *Id.*

Similarly, in the instant case, defense counsel's question regarding the effect of Mr. Sass's mental condition on his ability to appreciate the nature and quality of his actions did not violate Rule 704(b). Thus, this evidence was properly admissible and "properly admitted evidence does not open the door to inadmissible evidence." *U.S. v. Rosa*, 11 F.3d 315,335 (2nd Cir. 1993) citing *United States v. Rea*, 958 F.2d 1206, 1225 (2d Cir. 1991).

In response to this admissible question by defense counsel, the prosecutor asked the following question and obtained the following answer from the government's expert, Dr. Kalish:

> Q. Was the Defendant sane or insane at the time of the offense, from December 15th, 1992, to January 12th, 1993?
>
> A. He was very sane.
>
> Q. When you say "very sane", meaning -- you mean what?
>
> A. Well, he understood the nature and quality of his act, and he understood

that it was wrong.

Clearly, this question and the response it was designed to elicit violate Rule 704(b). Unlike the question asked by defense counsel, this question by the prosecutor did not relate to the symptoms and qualities of the disease the defendant allegedly had. Instead, this question required that the witness tell the jury whether the defendant was legally sane or insane at the time the offense was committed. Given this explanation by Dr. Kalish, that Mr. Sass was sane at the time of the offense, there was nothing left for the jury to decide regarding Mr. Sass's insanity defense; Dr. Kalish already decided for the jury. The prosecutor's question and Dr. Kalish's answer invaded both the province of the jury, by deciding the ultimate issue of Mr. Sass's sanity at the time of the offense and the province of the judge by instructing the jury on the meaning of the legal term "insanity". Therefore, because Mr. Sass's counsel's question of the defense expert did not violate

Rule 704 (b), it did not open the door to allow the admission of the testimony elicited by the prosecutor's improper questioning of the government expert, which was in clear violation of Rule 704(b).

However, even if this Court finds that the questions by defense counsel and the answers given by the defense expert crossed the line of admissibility, pursuant to Rule 704(b), the questions and inadmissible testimony elicited by the prosecutor from the government expert, in violation of Rule 704(b), were grossly disproportionate as a response.

> The doctrine of "opening the door," sometimes referred to as "curative admissibility," provides that when one party introduces inadmissible evidence, the opposing party thereafter may introduce otherwise inadmissible evidence, to rebut or explain the prior evidence. *Government of the Virgin Islands v. Archibald*, 987 F.2d 180, 186 (3rd Cir. 1993) *citing C. McCormick, on Evidence* §57 (4th ed. 1992); *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989).

In another case, *United States v. Baker*, 999F.2d 412,

416 (9th Cir. 1993), the Court rejected the government's argument that its improper comments during closing argument constituted a "fair response" to comments made by defense counsel in his closing argument. The government argued that defense counsel had "opened the door" to the prosecutor's improper comments by arguing in closing that the defendant's statement to police, "How did you guys find out?", did not refer to the bank robbery but may have referred to where he was staying or some other less incriminating subject. *Id.* In response to this argument, the prosecutor argued to the jury the following:

> Reason and common sense in light of background experience. You're under arrest for bank robbery. What bank? I didn't do it. What are you talking about? Wouldn't that be the natural human response if you did it - not and not to say anything more? There was no word from them after they were told what they were being arrested for."... So there was no contesting by either defendant. Not even you as parents, when you have said, Johnny did you eat that extra cookie? No, mom. No, it wasn't me. You know how we all act when we're accused of something? There's nothing here. (sic) *Id.* at 415.

The Court reversed the defendants' convictions, finding that the prosecutor's comments in rebuttal were "far broader than a mere response to the defense argument." *Id.* at 416-417.

In the instant case, as in *Baker*, the prosecutor's questions in rebuttal and the expert testimony elicited by them on the issue of Mr. Sass's sanity, were far broader than a mere response to defense counsel's question. The government expert's testimony far exceeded what was necessary to rebut or explain the defense expert's testimony on this issue or to remove any prejudice, which might have resulted from introduction of the defense evidence. If the defense expert's testimony "opened the door" to allow some government expert testimony regarding Mr. Sass's sanity, it did not "open the door" to permit the prosecutor to ask the government expert if Mr. Sass was sane at the time of the offense and it certainly did not "open the door" to allow the government expert to repeatedly express his opinion that Mr. Sass was sane at the time of the offense.

At the most the prosecutor should have been permitted to ask the government expert if the mental disease Mr. Sass allegedly had would have affected his ability to appreciate the nature and quality of his actions. This type of question and the answer it would have elicited would have been a proportionate response to defense counsel's questioning of the defense expert witness. However, it was clear error to permit the prosecutor to ask the government expert whether Mr. Sass was sane at the time of the offense because this question and the testimony it elicited far exceeded the scope of any opening, defense counsel may have created with its questioning of the defense expert.

> This doctrine referred to as "curative admissibility", is tempered by the need to place reasonable limits upon the amount and type of rebuttal evidence allowed to come in through the door. *David W. Louisell & Christopher B. Mueller, Federal Evidence* §11 at 49-50 (*citing Wigmore on Evidence* §15 (3d ed. 1940). Inadmissible evidence is permitted only to the extent necessary to remove any unfair prejudice, which might otherwise have ensued from the original evidence. *United States v. Winston*, 447 F.2d 1236, 1240 (D.C.Cir. 1971) (quotations

> omitted); See *United States v. Johnson*, 502 F.2d 1373, 1373 (7th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975). An "open door does not give an opponent unbridled license to introduce otherwise inadmissible evidence into the trial, nor does it justify receipt of rebuttal evidence merely because it is in the same category of excludable evidence as the evidence previously offered. *Louisell & Mueller, Federal Evidence* §11 at 63. *United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993).

In Mr. Sass's case, the doctrine of curative admissibility did not give the prosecutor the unbridled license to introduce the excessive amount of otherwise inadmissible evidence on the issue of sanity, which he elicited from the government expert. As the *Winston* Court warned:

> The doctrine of curative admissibility is one dangerously prone to overuse. Permission to explore in rebuttal with testimony not admissible on direct, on the ground that the other party has opened the doors, rests upon the necessity of removing prejudice in the interest of fairness. *Winston* at 1240 *citing, Crawford v. United States*, 91 U.S.App.D.C. 234, 237, 198 F.2d 976, 979 (1952).
>
> The doctrine is to prevent prejudice and is not to be subverted into a rule for injection of prejudice." *Winston* at 1240 *citing, Californis Ins. Co. v. Allen*, 235 F.2d 178, 180

(5th Cir. 1956).

In the instant case, the doctrine of "curative admissibility" was subverted into a rule for the injection of prejudice into the trial. The government expert was allowed to decide for the jury the only real defense issue in the case, Mr. Sass's sanity. The expert was even permitted to instruct the jury on the meaning of the legal term "sanity", through his testimony. As the Court of Appeals cautioned in *Winston*, 447 F.2d 1236 (D.C. Cir. 1971):

> This business about opening the door is a much overused issue and it carries with it an oversimplification. Opening a door is one thing. But what comes in through the door is another. Everything cannot come in through the door. *Winston* at 1240, (quoting the trial judge's comments with approval).

Even if defense counsel's one question regarding sanity "opened the door" to allow some response by the prosecutor, what came in through the door was unacceptable and extremely prejudicial to Mr. Sass and far exceeded what was necessary to remove any prejudice caused by the defense expert's testimony. As this Court

stated *in United States v. Young*, 470 U.S. 1, 12 (1985):

> In retrospect, perhaps the idea of "invited response" has evolved in a way not contemplated. *Lawn* and the earlier cases cited above should not be read as suggesting judicial approval or - encouragement - of response-in-kind that inevitably exacerbates the tensions inherent in the adversary process. As *Lawn* itself indicates, the issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's "invited response", taken in context, unfairly prejudiced the defendant.

Therefore, the doctrine of "curative admissibility", invoked by the government in this case, does not justify the unfairly prejudicial testimony by the government expert, regarding Mr. Sass's sanity at the time of the offense.

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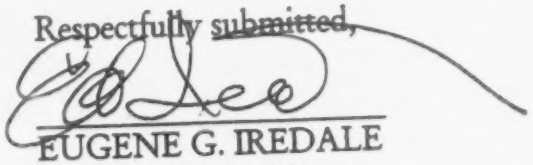
CONCLUSION

For the reasons set forth above, petitioner requests that this Court grant his petition for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, and set the case for briefing and oral argument.

Dated: July 1, 1997

Respectfully submitted,



EUGENE G. IREDALE
Attorney for Petitioner
DANNY RYAN SASS

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

April 08, 1997
CATHY A.CATTERSON,
CLERK
U.S COURT OF APPEALS

UNITED STATES OF AMERICA,	No. 96-50165
Plaintiff-Appellee,	D.C.No. CR-93-00068-RMB CR-92-705-JMR
v.	MEMORANDUM*
DANNY RYAN SASS,	
Defendant-Appellant.	

Appeal From a Judgment of
The United States District Court
For the Southern District of California
Rudi M. Brewster, District Judge, Presiding
Argued and Submitted March 7, 1997**
Pasadena, California

Before: BROWNING and KLEINFELD, Circuit Judges,

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

and MERHIGE, District Judge.**

The district judge did not abuse his discretion in admitting Dr. Kalish's testimony. The reason is that the defense had previously elicited testimony from its own medical expert that "Mr. Sass is unable to determine the rightness or wrongness of a course of action, and that's a byproduct of his organic brain damage and it's made worse by his personality – the personality diagnosis that he would be given of dependant and schizoid." The previously elicited defense testimony was of the sort prohibited by Federal Rule of Evidence 704(b). Because appellant did not object to the government's rebuttal testimony, equally violative of Federal Rule of Evidence 704(b), we review only for plain error, under Federal Rule of Criminal Procedure 52(b). There was no plain error, despite the 704(b) violation, because of the doctrine variously labeled "opening the door", "fighting fire with fire," and "curative admissibility." United States v. Kessi, 868 F.2d 1097, 1108 (9th Cir. 1989).

Nor can we conclude that the district judge abused his discretion in allowing the jury to look at the transcripts and listen to those tapes which were inaudible. The judge gave a proper admonition to the jury that the tape recordings, not the transcripts, were the evidence they had to consider in their deliberations, and the agent who participated in the conversations and the preparation of the transcript also testified to their accuracy. See United States v. Booker, 952 F.2d 247, 249-50 (9th Cir. 1991). There was no abuse of discretion.

Sass did not object to the government witness instruction at trial, so we only review it for plain error. United States v. Harper, 33 F.3d 1143, 1150 (9th Cir. 1994). Cool v. United States, 409 U.S. 100 (1972), is distinguishable. There, the testimony erroneously subjected to the instruction exonerated the defendant; here, the testimony had little or no relevance to the only defense presented, insanity. Also in Cool, the instruction itself was erroneous; here the instruction was correctly worded, but in the

circumstances, should not have been given.

We do not decide Sass's ineffective assistance of counsel claim. Such claims are ordinarily reserved for habeas corpus proceedings. United States v. Bauer, 75 F.3d 1366, 1379 (9th Cir. 1996).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 16 1997
CLERK U.S. DIST.
COURT SOUTHERN
DISTRICT OF CALIFORNIA
/s/ MS DEPUTY

No. 96-50165
CT/AG#: CR-93-00068-1-RMB

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

DANNY RYAN SASS
Defendant-Appellant

APPEAL FROM the United States District Court for the Southern District of California. (San Diego).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego)

and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 08, 1997.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
April 30, 1997
by/s/ Renaldo Guzman
Deputy Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. Federal Rules of Evidence Rule 704(b):

b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state o condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Title 18, U.S.C. § 17:

a) **Affirmative Defense**.- It is an affirmative defense to a prosecution under any Federal statute that at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

b) Burden of proof.- The defendant has the burden of proving the insanity by clear and convincing evidence.